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No. 95-114

In the

Supreme Court of the United States

October Term, 1995

STUBBLEFIELD CONSTRUCTION COMPANY
and STUBBLEFIELD PROPERTIES,
Petitioners,

v.

CITY OF SAN BERNARDINO,
Respondent.

Petition for Writ of Certiorari
to the Court of Appeal of California
Fourth Appellate District, Division Two

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

*JAMES S. BURLING
VICTOR J. WOLSKI
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae
Pacific Legal Foundation

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are

attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

Attorneys for PLF have participated in numerous cases concerning constitutional protections for property rights before this Court and other courts representing both amicus curiae and property owners. Many of these cases involved land use and the Due Process Clause, including *Lockary v. Kayfetz*, 908 F.2d 543 (9th Cir. 1990), in which PLF attorneys were counsel of record, and *Pennell v. City of San Jose*, 485 U.S. 1 (1988), in which PLF participated as amicus curiae. PLF also participated as amicus curiae before this Court in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992).[1]

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.2, written permission from all parties to file this brief has been lodged with the Clerk of the Court.

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[1] PLF has also participated in every major case before this Court in the last two decades involving land use and the Takings Clause. For example, PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF has participated as amicus curiae in cases from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to *Dolan v. City of Tigard*, 512 U.S. __, 129 L. Ed. 2d 304 (1994).

STATEMENT OF THE CASE

Petitioners Stubblefield Construction Company and Stubblefield Properties (Stubblefield) own property located within the limits of respondent City of San Bernardino (City). Stubblefield's parcel had been zoned R-3, allowing for multifamily housing, from the time the property was annexed by the City in 1968. *Stubblefield Construction Co. v. City of San Bernardino*, 32 Cal. App. 4th 687, 696 (1995), Petition for a Writ of Certiorari (Pet.) at A-6. In May, 1986, Stubblefield submitted to the City a development application for a 492 unit apartment project. The zoning at that time allowed for as many as 638 units on the parcel and, according to the City's planning director, the application met all the requirements then in place. *Stubblefield*, 32 Cal. App. 4th at 697 n.4, Pet. at A-7 n.4.

Stubblefield's application was not approved, however. It was not approved because of a series of actions taken by the City to delay final approval until the downzoning of the parcel reduced the number of units that could be developed to just four. *Id.* at 698, Pet. at A-8-9. On September 10, 1986, the City Council passed an ordinance allowing third parties to appeal planning department decisions that the lack of significant impacts would excuse a project from the requirement of a costly and time-consuming environmental impact report (EIR). On October 20, 1986, the City adopted an "urgency ordinance," effective in 30 days, that ended its policy of processing development applications under the zoning rules in force when the application was submitted. *Id.* at 697, Pet. at A-8. Both of these ordinances were sponsored by City Councilman Steve Marks, a vocal opponent of Stubblefield's project.

Two days later, the City's R-3 zoning ordinance was amended to impose a two-story height limit on apartments and to require a conditional use permit to exceed this limit. Stubblefield's project contained three-story apartment

buildings. *Id.* To insure that the new R-3 zoning ordinance would apply to Stubblefield's project under the urgency ordinance, Marks delayed final approval of the project by personally appealing the planning department's EIR decision, using the ordinance he had sponsored. Thus, approval was not received within 30 days of passage of the urgency ordinance, and the new R-3 zoning requirements controlled the project. *Id.* at 698, Pet. at A-9.

Stubblefield requested that its project be "grandfathered" so that the project would be evaluated under the zoning rules in place when the application was submitted. The City delayed action on this request for over one year. In the meantime, a moratorium on development was implemented in response to a lawsuit challenging the City's general plan. The grandfathering request was denied on January 19, 1988, at a hearing in which Mr. Stubblefield was not allowed to speak for petitioners. Five months later the moratorium was lifted and Stubblefield's property was downzoned to allow only four apartment units. *Id.* at 699-700, Pet. at A-10-12.

This pattern of events was more than a run of bad luck for Stubblefield. A subsequent 10-week, 31-day jury trial resulted in the accumulation of evidence showing that a number of the City's actions were taken for the purpose of delaying and blocking Stubblefield's project. *Stubblefield*, 32 Cal. App. 4th at 714, Pet. at A-35. The urgency ordinance was justified solely by "the desire to block approval of the Stubblefield project." *Id.* at 698, Pet. at A-8. The change in the height limit of R-3 structures and an amendment requiring that structures be compatible with their neighborhood were also "aimed at the Stubblefield project." *Id.* at 697-98, Pet. at A-7-9.

The jury decided that the City's actions were not "performed for a purpose which was substantially related to the public health, safety, morals or general welfare," Pet.

at A-43, were "motivated with a purpose of intending to discriminate against Stubblefield," Pet. at A-44, and resulted in harm to petitioners totaling $11,537,000. *Stubblefield*, 32 Cal. App. 4th at 694-95, Pet. at A-44-45. On the basis of these findings, the court entered judgment in petitioners' favor, determining that the City's actions violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment under 42 U.S.C. § 1983.[2] The trial court denied the City's motion for judgment, notwithstanding the verdict, and granted the City's motion for a new trial on the damages issue. *Id.* at 695, Pet. at A-4.

The California Court of Appeal reversed this judgment, holding that actions taken in response to "concerns of constituents in the affected area and other political concerns" are "not, as a matter of law ... arbitrary or irrational." *Stubblefield*, 32 Cal. App. 4th at 710-11, Pet. at A-29. Even the unusual efforts of Marks to defeat the project "merely represent the democratic process at work." *Id.* at 714 n.19, Pet. at A-36 n.19. The Court of Appeal belittled the case as "an ordinary dispute between a developer and a municipality." *Id.* at 712, Pet. at A-32. Since the R-3 amendments and the moratorium applied generally, petitioners were not singled out, according to the Court below, so the actions were at least debatable and, hence, rational. *Stubblefield*, 32 Cal. App. 4th at 711-12, Pet. at A-30-32.

Thus, for actions involving property the California Court of Appeal rejected the traditional test for a Due Process violation, which defined "clearly arbitrary and unreasonable" to mean "having no substantial relation to the public health, safety, morals, or general welfare." *Village of*

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[2] A number of other causes of action were dismissed, six before trial and four after trial. *Stubblefield*, 32 Cal. App. 4th at 702. A second lawsuit brought by petitioners challenging the general plan adopted in June, 1988, has yet to be tried. *Id.* at 703 n.9.

Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). In California, political motivations have been deemed just as legitimate as health and safety. As long as the neighbors want it, zoning changes restricting the use of private property are "rational."

SUMMARY OF ARGUMENT

Several circuits and the *Stubblefield* court have adopted an approach to judicial review of alleged property deprivations that is in conflict with a number of circuits and with the philosophy and purpose behind the United States Constitution. Property rights, an explicit portion of the Bill of Rights and one of the three categories of individual rights specifically protected under the Due Process Clause, should not be restricted by clearly arbitrary and irrational government actions. When such restrictions do not relate to a legitimate purpose of government, they violate due process. The courts which require some additional injury to constitute a cognizable constitutional claim, or which rubber stamp approval for all zoning decisions based on hypothetical purposes, are departing from the precedents of this Court and the meaning of the constitutional guarantee of due process.

Courts should ensure that government decisions restricting the use and enjoyment of private property relate to a legitimate public purpose. This entails an investigation of the factual circumstances surrounding that property and the considerations of the government in its decision-making process. Proof that land use restrictions were imposed for either no reason or for an impermissible reason should be proof that the property owner was treated in arbitrary and capricious manner. The *Stubblefield* court was incorrect to hold that any constituent opposition to a development project affords a rational basis for land use restrictions. Unless this opposition is based on legitimate health, safety, morals, or general welfare concerns; it is not transformed into a rational

basis merely by being a part of the political process. The court below also seriously departed from the Constitution and from this Court's precedents in holding that the ownership of real property does not implicate a property right protected by due process. Due process includes the guarantee that one's property rights will not be interfered with in an arbitrary manner. The right to use and enjoy ones' own property is and has always been at the core of property ownership and the requirement that one show a "vested right" or "entitlement" to a particular use does violence to the plain meaning and historical purpose of the Due Process Clause.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

THIS COURT SHOULD RESOLVE THE MULTIPLICITY OF CONFLICTS OVER WHETHER ARBITRARY AND CAPRICIOUS REGULATION OF PROPERTY SATISFIES DUE PROCESS

The *Stubblefield* case places squarely before this Court a number of key questions concerning how alleged deprivations of property are to be analyzed under the United States Constitution. A 31-day jury trial resulted in a jury determination that a number of respondent's actions in adopting zoning ordinances and denying petitioners' development applications did not relate to legitimate public health, safety, morals, or general welfare purposes but instead were aimed at blocking petitioners' development. The appellate court reversed this verdict, on the grounds that political motivations--the placating of constituents--are rational purposes for public officials, and that zoning ordinances that purport to apply generally will always pass rational basis review. *Stubblefield*, 32 Cal. App. 4th at 710-11.

This Court just last year announced the desire to rehabilitate the status of property protection under the Takings Clause from that of a "poor relation" compared to the other individual rights enumerated in the Bill of Rights. *Dolan v. City of Tigard*, 129 L. Ed. 2d at 321. Yet various of the circuits, as well as the State of California in this case, give short shrift to property rights when reviewing government regulations under the Due Process Clause.

The Due Process Clause guarantees against deprivations of "life, liberty, or property, without due process of law." United States Constitution Amendments V, XIV, § 1. Due process has long been understood to mean more than mere procedural formalities. Due process embraces the fundamental concept that certain government decisions must instead relate to a legitimate end of government and may not be made for no reason or for a bad reason. *See Lawton v. Steele*, 152 U.S. 133, 136-37 (1894); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). This concept is the essential difference between the rule of law and arbitrary government, between a government of laws and one of men. Certain public decisions by their very nature may be arbitrarily decided--such as the color of the wallpaper in city hall, the number of members of a board or commission, maybe even the generally applicable tax rate. But decisions to restrict the liberty of individuals or their enjoyment of their property must be justifiable by one of the legitimate ends of government, the promotion of health, safety, morals, or general welfare. "Because we said so" might be an acceptable if somewhat disserving rule for a paternalistic relationship but has no place in a system of limited government designed to protect and defend the rights of free men and women.

Lower court decisions abound upholding restrictions on the use of property without regard for the reasons behind these restrictions. This shabby treatment of property rights

under Due Process review is ameliorated somewhat by the heightened protection for property rights mandated by the Takings Clause. Thus, regulation of the use and enjoyment of property must have more than a mere hypothetical connection with a legitimate end of government--it must *in actuality* "substantially advance" such an end. *Dolan*, 129 L. Ed. 2d at 316; *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3; *Agins v. City of Tiburon*, 447 U.S. at 260; . This Court has thus recognized that the government's authority over private property is proper only when it *will further* a legitimate goal. If no such goal is furthered, then government cannot mandate a restriction on the use of property--unless it decides to condemn that property right.

The Takings Clause, however, is not a substitute for the protections of the Due Process Clause. The former guarantees only that Just Compensation be paid for the property taken, it does not stop government misconduct. The latter can invalidate the government action and could provide for the payment of actual damages to compensate for the personal injury inflicted upon an individual who has been the subject of unlawful treatment at the hands of the government. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985); *see also Walz v. Town of Smithtown*, 46 F.3d 162, 169-70 (2d Cir. 1995) (emotional distress and pain and suffering damages recovered for substantive due process violation); *Coniston Corporation v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (injunctive relief and "full tort damages" available under Due Process Clause).

Unfortunately, as will be seen below, many courts act as if the promise of private property protection under the Takings Clause were grounds to erase the word "property" from the Due Process Clause. If this situation persists, the Takings Clause would remain the "poor relation" of the other explicit guarantees such as those in the First Amendment.

Stubblefield affords this Court the opportunity to correct the situation and provide firm guidance to the lower courts.

This area of the law has been described as one "not known for its simplicity." *Schaper v. City of Huntsville*, 813 F.2d 709, 716 (5th Cir. 1987). The wide variety of approaches used by the various courts (and impressively catalogued in the Petition for Writ of Certiorari) indeed pose a daunting challenge to practitioners in the field of land use. Yet the issues can be boiled down to a few simple but important questions over which the courts are badly split: Are zoning and other decisions affecting the use and enjoyment of property immune from a substantive due process attack by their very nature? May motives and the background circumstances of such decisions be probed by fact finders to decide if any purpose (particularly an improper purpose) was the basis of these decisions? And are political concerns such as the demands of constituents a legitimate purpose to support restrictions on the use and enjoyment of private property?

A. Are Zoning and Other Decisions Affecting the Use and Enjoyment of Property Immune from a Substantive Due Process Attack by Their Very Nature?

The circuits are split in the seriousness with which they consider zoning challenges under the Due Process Clause. It appears obligatory that the standard disclaimer that federal courts are not zoning boards of appeals be invoked[3] by

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[3] It is curious that courts do not similarly protest that employment discrimination cases threaten to turn them into boards of employment appeals. *Cf. DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 601 n.11 (3d Cir.) (federal courts have not been overrun by plaintiffs denied occupational licenses), *petition for cert. filed*, 64 U.S.L.W. 3084 (July 28, 1995) (No. 95-163).

certain circuits, which deride zoning challenges as "run of the mill," "typical," "ordinary," etc.[4]

At this extreme end of the range appears to be the view that zoning laws are the raison d'être of local government and are thus immune from serious facial challenge. This approach stems from a unfortunate philosophical premise that government has as its mission the regulation of property rather than the protection of property rights. The latter premise would uphold regulations that are intended to prevent injury to the property rights of citizens by placing reasonable limits on what others could do. The former premise gives carte blanche to regulators because regulation is what they are supposed to do.

Some of the circuits which indulge the land use regulatory process go so far as to explicitly adopt a double standard when considering due process challenges to such decisions. The Seventh Circuit "requires that 'in addition to showing that [a zoning] decision was arbitrary and irrational, the plaintiff must show either a separate constitutional violation or the inadequacy of state law remedies.'" *Hartland Sportsman's Club, Inc. v. Town of Delafield*, 35 F.3d 1198, 1202 (7th Cir. 1994) (quoting *Polenz v. Parrott*, 883 F.2d 551, 558-59 (7th Cir. 1989). In the First Circuit, "arbitrary and malicious" action or a decision made in "bad-faith" are not of "*constitutional* dimension" when the deprivation alleged is of property. *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990). That circuit requires conduct that is "shocking or violative of universal standards of decency" to rise (or, more accurately, sink) to the level of

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[4] *See, e.g., Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) ("too typical of the run of the mill dispute"); *Coniston Corp.*, 844 F.2d at 467 ("garden-variety zoning dispute"); *see also Stubblefield*, 32 Cal. App. 4th at 712 ("an ordinary dispute").

a constitutional claim. *Id.* (quoting *Furtado v. Bishop*, 604 F.2d 80, 95 (1st Cir. 1979)). The Eighth Circuit requires that property owners "establish that the government action complained of is 'truly irrational,' that is, 'something more than ... arbitrary, capricious, or in violation of state law." *Anderson v. Douglas County*, 4 F.3d 574, 577 (8th Cir. 1993) (citing *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992) (quoting *Lemke v. Cass County*, 846 F.2d 469, 470-72 (8th Cir. 1987) (en banc) (Arnold, J., concurring)).

The *Stubblefield* court adopted the First Circuit's "shocks the conscience" standard for "substantive due process in the land use context." *Stubblefield*, 32 Cal. App. 4th at 709-10, Pet. at A-28-29. The conflict between this approach and the traditional "no substantial relation" *Euclid* standard used by this Court and most circuits, Pet. at 14-15, should be resolved by granting the petition for writ of certiorari.

B. May Motives and the Background Circumstances of Such Decisions Be Probed by Fact Finders to Decide if any Purpose (Particularly an Improper Purpose) Was the Basis of These Decisions?

If government is not given a free pass in zoning decisions, then the Court should announce just how lower courts are to determine if zoning decisions--both the passage of legislation and the adjudication of permit applications--are "clearly arbitrary and irrational." Must there be a stated purpose for the decision? Is a stated purpose taken at face value, or should the court look to see if in actuality it is a "pig in the parlor." *See Euclid*, 272 U.S. at 388 (consider restrictions "in connection with the circumstances and the locality"). If a stated purpose is not required, and is not present, will the court hypothesize a conceivable justification, or will it attempt to determine the actual motivation? And if a legitimate purpose could be fabricated by a court, but the

evidence shows either that the decision makers did not bother themselves with a purpose or had a bad, impermissible purpose in mind, is the decision arbitrary?

There is a variety of approaches to this question taken by the circuits. Some have held that an improper motive or the absence of a proper purpose is a question of fact for a jury. *See, e.g., DeBlasio*, 53 F.3d at 601-02; *Brady v. Town of Colchester*, 863 F.2d 205, 215-16 (2d Cir. 1988) (for trier of fact to decide if rational basis exists). Others deny juries the opportunity to determine the actual motives of the decision makers, and will uphold zoning decisions on the basis of any conceivable relationship between a hypothesized legitimate purpose and the challenged zoning decision. *See Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244-46 (1st Cir. 1990); *Shelton v. City of College Station,* 780 F.2d 475, 482-84 (5th Cir. 1986) (en banc) (zoning decisions will be reviewed by looking for *a*, rather than *the*, basis).

This Court's past decisions should not require an extremely deferential version of rational basis review of zoning decisions. The famous *Carolene Products* footnote begins, "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as *those of the first ten amendments*." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (emphasis added). Unless protection of real property ownership remains a "poor relation" of the rest of the Bill of Rights, this "narrower scope" should be employed in evaluating laws that regulate real property usage, as opposed to the economic and social legislation for the workplace.

This Court has, on occasion, refused to defer to the legislative judgment behind a zoning ordinance and found a

due process violation despite *some*[5] connection between the ordinance and legitimate purposes. *Moore v. City of East Cleveland*, 431 U.S. 494, 500 (1977) (ordinance prohibited members of extended family from living with grandmother). In *Moore*, the plurality cast the issue in terms of a "liberty" interest implicating the "institution of the family," *id.* at 502-04, but Justice Stevens posed the "critical question" as whether the ordinance "is a permissible restriction on appellant's *right to use her own property as she sees fit.*" *Moore*, 431 U.S. at 513 (Stevens. J., concurring in the judgment) (emphasis added).

This Court's reluctance to accept uncritically the government's explanation for a zoning ordinance, finding the ordinance unconstitutional despite the presence of a relationship to legitimate purposes, could become the model for evaluating alleged arbitrary treatment of real property usage. *Stubblefield* presents this Court with an unusual opportunity to resolve the Circuit conflicts on this issue in a manner that addresses both the role of the fact finder and of the court and, if necessary, the difference between review of legislation (the zoning amendments) and its administration (the denials of development and grandfathering permits).

C. Are Political Concerns Such as the Demands of Constituents a Legitimate Purpose to Support Restrictions on the Use and Enjoyment of Private Property?

If courts are to scrutinize the purpose behind zoning decisions, they will need direction concerning which purposes are legitimate. Does "public health, safety, morals, or general welfare" encompass decisions to restrict the use of people's property at the request of their neighbors? *See*

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[5] Albeit this relation was deemed "marginal[]" and "tenuous." *Moore*, 431 U.S. at 499-500.

Stubblefield, 32 Cal. App. 4th at 697 (opponent was "merely reflecting the concerns of his constituents").

In one sense, it is certainly not "irrational" for elected officials to make decisions on the basis of the views of their constituents--just as it similarly would be "rational" to do special favors for big campaign contributors. But to burden the liberty of individuals, or to restrict their enjoyment of the property they own, requires a legitimate public purpose. The fact that you are outnumbered in the community or failed to give as much money to elected officials as other members of the community should not have any bearing on your enjoyment of your rights. Yet, some Circuits have allowed the clamor of the crowd to dictate such decisions. *See Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6th Cir. 1995) (neighbors concern over effect on property values reasonable basis for denying permit); *Coniston Corp.*, 844 F.2d at 467 ("nothing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition"). Other circuits have considered such political motivations to be arbitrary and improper. *See Marks v. City of Chesapeake, Virginia,* 883 F.2d 308, 309 (4th Cir. 1989) (residents objected to permit for fortune teller);[6] *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988) (evidence that city councilmen opposed project for "partisan political or personal reasons").

This Court has held that it is a due process violation for the government to delegate to a property owner's neighbors the power to regulate that person's land. *State of Washington*

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[6] *Cf. Sylvia Development Corp. v. Calvert County, Maryland*, 48 F.3d 810, 828 (4th Cir. 1995) ("[e]ven if ... appeasing the public was the only purpose behind the Board's action," decision had rational basis because the citizens expressed legitimate traffic safety and water supply concerns").

ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121-23 (1928) (law requiring written consent of neighbors owning two-thirds of nearby property was a "delegation of power ... repugnant to the due process clause;" neighbors would have been "free to withhold consent for selfish reasons or arbitrarily, and may subject the [property owner] to their will or caprice"); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912) (power to request establishment of building line without reviewable standards was Due Process violation; neighbors could invoke ordinance "solely for their own interest, or even capriciously"). These cases were not upset by this Court's subsequent decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 677-78 (1976), which pointed out the difference between a referendum of the entire voting public and "standardless delegation of power to a limited group of property owners."

If one's neighbors cannot be given the power to decide one's land use, these neighbors' opposition to a proposed use, without more, should not supply the grounds for a rational basis. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (under rational basis equal protection review, neighbors' "mere negative attitudes, or fear, *unsubstantiated by factors which are properly cognizable* in a zoning proceeding, are not permissible bases") (emphasis added). This Court should grant the petition for writ of certiorari to settle this conflict over permissible purposes for land use regulations.

II

THIS COURT SHOULD RESOLVE THE CONFLICTS OVER WHETHER OWNERSHIP OF PROPERTY IS A SUFFICIENT INTEREST TO RECEIVE DUE PROCESS PROTECTION

The *Stubblefield* court also adopted the notion that ownership of private property does not involve a property interest protectible by the Due Process Clause. This bizarre

decision cannot be shrugged off as an anomaly, as several Circuit Courts of Appeals have also rejected the basic idea that ownership of property entails use and enjoyment of that property. These courts look instead for a "vested right" or "entitlement" to a particular permit in order for Due Process protections to be triggered.

This question should have been settled long ago. In 1829, speaking through Justice Story, this Court held that the American Revolution settled it, resulting in a government for which it would be repugnant to its very nature that "the rights of property are left solely dependent upon the will of a legislative body without restraint." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829). The *Wilkinson* Court declared, "[t]he fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred," *id.*, and stressed "the right of the citizens to the free enjoyment of their property lawfully acquired." *Wilkinson*, 27 U.S. (2 Pet.) at 657-58.

The passage of the years has not undermined recognition of the fundamental basis of property ownership in the American political system. For example, in discussing the importance of procedural due process to reduce the likelihood of *substantively* unfair treatment of property owners, this Court explained, "the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's *right to enjoy what is his*, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (emphasis added).

One would think it obvious that fundamental to the ownership of property is the use and enjoyment of that property, and that restrictions on such use would definitely implicate the Due Process Clause. But the *Stubblefield* court instead adopted the view that a property owner challenging the denial of a development permit must have a "vested

right" under state law--the right to receive that permit--in order to assert a Due Process claim. *Stubblefield*, 32 Cal. App. 4th at 707-08. Unless one can demonstrate an entitlement under state law to erect a certain building, one cannot complain about the government's refusal to allow it to be built.

A similar approach is taken by a number of federal Courts of Appeals. The Second, Fourth, Sixth, and Eleventh Circuits all require the showing of the right to receive permission for a particular use of property in order to make out a Due Process claim.[7] There is a sharp conflict between the circuits on this issue, as several Courts of Appeals have recognized that it is basic to ownership of property that one receive due process of law when use is restricted. *See, e.g.*, *DeBlasio*, 53 F.3d at 601 ("one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership"); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("An owner may build on its land; that is an ordinary element of a property interest."). *See also Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263 (1977) (purchaser's "right to be free of arbitrary or irrational zoning actions").

The circuits that do not consider property to be property protected by the Due Process Clause have relied on

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[7] *RRI Realty Corp., Inc. v. Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989) (must show no discretion in issuance of permit, or that issuance is "virtually assured" if under "narrowly circumscribed" discretion); *Sylvia Development*, 48 F.3d at 826 (must establish "legitimate claim of entitlement"); *Triomphe Investors*, 49 F.3d at 202 (need "legitimate claim of entitlement" to permit or "justifiable expectation" it would be issued); *Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894-95 (11th Cir. 1989) (property owner lacked "vested right" to permit).

this Court's decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). But *Roth* merely held that a "legitimate claim of entitlement" to a "benefit," in that case a nontenured teaching position, was needed to trigger certain procedural protections. *Id.* *Roth* was broadening the class of claims that come under Due Process protection, not contracting them, by recognizing that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-72. It is incredible that Roth could be read to mean that land ownership is not protected by due process.

This approach misapprehends what is at stake in due process land use claims. Unlike a professor seeking continued employment, property owners are not claiming the right to a government-established benefit when they seek to make use of their property. *Nollan*, 483 U.S. at 833 n.2 ("the right to build on one's own property--even though its exercise can be subjected to legitimate permitting requirements--cannot remotely be described as a 'governmental benefit'"). One of the defining characteristics of property ownership is that the owners get to use their land. The permit process does not confer any benefits or rights upon the successful applicants. To the contrary, this process ***restricts*** existing rights to ensure that uses of property do not impair the rights of others. It is a process that *protects* rights, rather than confers them.[8]

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[8] *See River Park*, 23 F.3d at 166. "Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property. ... Licenses, permits, ... and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to intervene with the property itself."

CONCLUSION

In order to ensure that property rights are not treated as a "poor relation" of the rest of the rights guaranteed in the Bill of Rights, property owners' claims based on due process protections against arbitrary and irrational government actions must be given meaningful review by the courts. In *Stubblefield*, the California Court of Appeal refused to accept that a violation of due process could be found based on a jury's finding that a number of land regulation activities--including both zoning ordinance amendments and development applications--did not substantially relate to any public health, safety, morals, or general welfare purposes. The court below accepted these actions as politics as usual and found that a city councilman's personal vendetta against a landowner and its proposed development was justified by the opposition to the development on the part of the elected official's constituents. The court also held that real property ownership alone, without the right to a government-created "entitlement" to a particular usage, does not implicate property rights protectible under the Due Process Clause.

In order to settle a large number of conflicts between the circuits on the important issues relating to due process protection of property, amicus respectfully requests that this Court grant the petition for writ of certiorari.

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Respectfully submitted,

*JAMES S. BURLING
VICTOR J. WOLSKI
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae
Pacific Legal Foundation